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No. 15 OCTOBER TERM, 1905.

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Supreme Court of the United States

The Atlantic Coast Line Railroad Company,
Plaintiff in Error,

vs.

The North Carolina Corporation Commission.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN G. JOHNSON,
WARREN G. ELLIOTT,
FRANK P. PRICHARD,
For Plaintiff in Error

(19645)

Allen, Lane & Scott, Prs., Phila.

IN THE SUPREME COURT OF THE UNITED STATES.

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STATEMENT OF THE CASE.

This was originally a proceeding in the Superior Court of Wake County, North Carolina, on an appeal by the Atlantic Coast Line Railroad Company from an order made by the North Carolina Corporation Commission. The Superior Court reversed the order. On appeal by the Commission to the Supreme Court of North Carolina the judgment of the Superior Court was reversed and the order of the Commission was sustained and enforced. Thereupon the Atlantic Coast Line Railroad Company took

the present writ of error on the ground which was raised in the court below (Record, page 265), that the order was in violation of the Constitution of the United States.

The facts are as follows:

The Atlantic Coast Line Railroad Company, a corporation of the State of Virginia, authorized by the laws of the State of North Carolina to carry on business in that State, operates, in North Carolina, a railroad, over which it transports freight and passengers on through routes between other States, and between local points in the State of North Carolina. Its line is crossed by the line of the Southern Railway Company, at a point called Selma. (See diagram between pages 38 and 39 of the Record.)

For about ten years prior to the controversy in question, the Atlantic Coast Line Railroad Company had arranged and maintained its schedules, so that the scheduled time of arrival of a through train, No. 39, at Selma, was prior to the arrival at that point of train No. 135 of the Southern Railway Company, thus allowing passengers to make connection. Another train of the Atlantic Coast Line Railroad Company made connection further east with a train of the Southern Railway Company at a point called Goldsboro. (Record, page 98.)

On October 3d, 1903, the Southern Railway Company addressed a letter to the North Carolina Corporation Commission (Record, page 10), stating that it was their intention to change their running schedule, by advancing the time of arrival of train 135 at Selma thirty-five minutes, leaving Selma at 2.25 instead of at 3 P. M. This would break the connection with the Atlantic Coast Line Railroad Company's train No. 39, which arrived at Selma at 2.50.

In consequence of this communication, the North Carolina Corporation Commission requested the Atlantic Coast Line Railroad Company to change its schedule to agree with that of the Southern Railway Company, and to make its train No. 39 connect with train No. 135 of the Southern

Railway Company, leaving Selma at 2.25 under the new schedule.

The Atlantic Coast Line Railroad Company thereupon took up the matter with the other roads in the North over which its through train No. 39 passed, and made strenuous efforts to arrange a new schedule, but found it wholly impracticable. The correspondence between the Commission and the Atlantic Coast Line Railroad Company is to be found on pages 11 to 16 of the Record.

The North Carolina Corporation Commission thereupon made an order, requiring the Atlantic Coast Line Railroad Company to rearrange its schedule, so as to advance the arrival of its train No. 39 at Selma to correspond with the change of schedule of the Southern Railway Company (Record, page 17); but, upon the protest of the Atlantic Coast Railroad Company, (Record, page 19), suspended the order (Record, page 27) and gave a hearing to the parties. The result of that hearing was a finding and order of the Commission (Record, page 28), whereby the Commission found that it was impracticable for the Atlantic Coast Line Railroad Company to adopt a schedule under which its train 39 could arrive at Selma in time to connect with the train of the Southern Railway Company under the latter's new schedule. The Commission, however, found that the convenience of the traveling public required that the Atlantic Coast Line Railroad Company should furnish transportation to passengers who might wish to connect with the Southern Railway Company's train at Selma, and therefore ordered that the Atlantic Coast Line Railroad Company should furnish such transportation, either by extending the run of certain local branch trains forty-two miles farther, along the main line to Selma, or else by providing an entirely new and additional train for the service. (Record, page 30.) Exceptions filed to this order were dismissed by the Commission. (Record, page 77.) The Atlantic Coast Line Railroad Company appealed to the Superior Court of the State of North Carolina. Upon the trial, the evidence showed that the Atlantic Coast Line Railroad Company ran four trains a day to Selma (Record,

page 248), and that there was not any single point on its entire line at which it did not have two trains carrying passengers each way (Record, page 187), this being twice the number required by law; that there was no complaint that its line did not run an ample number of trains to accommodate all travel for points on its own line, or that it had not arranged its schedules to most conveniently serve the purposes of the general travel on those lines, having regard to all of its connections. (Record, pages 97-102.) It appeared, however, that persons residing in a territory around Tarboro, Nashville and Wilson, and other points on certain branch lines of the Atlantic Coast Line Railroad, (Record, pages 80-180) who wished to travel by and to reach certain points on, the Southern Railway Company's lines, were inconvenienced by being unable, owing to the Southern Railway Company's change of schedule, to make connection at Selma with train 135 on the Southern Railway, which left there at 2.25 P. M. It also appeared that the Atlantic Coast Line Railroad Company had, at Rocky Mount, on its main line, two local branches, one to Spring Hope and one to Plymouth, over which it ran trains (see diagram, page 38), but that it was impracticable for various causes to extend the run of these local trains forty-two miles over the main line to Selma. It also appeared that if a special train were to run between Rocky Mount and Selma, in order to connect with the train on the Southern Railway according to the new schedule of that road, it would have to be run at a loss to the Atlantic Coast Line Railroad Company. It also appeared from the evidence that the general business of the company in North Carolina was profitable. (Record, page 153.)

The following special findings were made by the jury (Record, page 85):—

> "1. Is it practicable for train No. 39 of the At-"lantic Coast Line Railroad, due to arrive at Selma "at 2.50 P. M., to make connection at Selma with "train No. 135, westbound, of the Southern Railway, "due to leave Selma at 2.25 P. M.?
>
> "Answer: No.
>
> "2. Is it practicable to make said connection by

"extending the run of the Plymouth train daily "from Plymouth to Selma and return, and if so, "what would be the additional expense?

"Answer: No.

"3. Is it practicable to make said connection by "the use of the Spring Hope train, and if so, what "would be the additional expense?

"Answer: No.

"4. In order to make such connection would de- "fendant company have to run an additional train "on its main line from Rocky Mount to Selma?

"Answer: Yes.

"5. Is it practicable for said train to safely run the "schedule prescribed in plaintiff's order, having due "regard to the number of trains and number of stops, "on defendant's main line from Rocky Mount to "Selma?

"Answer: Yes.

"6. What would be the daily cost of operating "such train from Rocky Mount to Selma and return?

Answer: Forty dollars.

"7. What would be the probable daily receipts "from such train?

"Answer: Twenty-five dollars.

"8. Is it reasonable and proper that, for conveni- "ence of the traveling public, the defendant company "should be required to make such connection?

"Answer: Yes.

Upon these findings the Superior Court entered judgment for the Atlantic Coast Line Railroad Company, and reversed the order of the Commission. (Record, page 86.)

The Commission thereupon appealed to the Supreme Court of North Carolina, which court reversed the judgment of the Superior Court and entered judgment affirming and enforcing the order of the Commission. (Record, page 260.)

From this judgment of the Supreme Court of the State of North Carolina, the Atlantic Coast Line Railroad Company takes the present writ of error.

The statutes of North Carolina bearing upon the subject

of the controversy and referred to by the parties or by the court were as follows:—

Code of North Carolina, section 1957, sub-section 9, originally enacted in 1871-72, incorporated into the Code of 1883, and since the decision of this case incorporated into chapter 61 of the revision of 1905, section 2567, sub-section 9; section 2614:—

"Every railroad corporation shall have power:

* * * * * * *

"9. Regulation of time and manner of transportation.

"To regulate the time and manner in which passengers and property shall be transported and the compensation to be paid therefor; and such compensation for any passenger and his ordinary baggage shall not exceed five cents per mile."

An Act to amend chapter 49 of the Code, ratified February 9th, 1893 (P. L., 84):—

"SECTION 1. That the Board of Railroad Commissioners of North Carolina are hereby empowered, whenever it shall appear wise and proper so to do, to authorize, allow and permit any railroad company operating in this State to run one or more fast mail trains over its road which shall only stop at such stations on the line of the road as may be designated by the company: *Provided*, that in addition to such fast mail train said railroad shall run at least one passenger train in each direction over its road on every day except Sunday, which shall stop at every station on the road at which passengers may wish to be taken up or put off: *Provided*, nothing in this Act shall be construed to authorize any company, persons or corporations to run any trains over the Petersburg Railroad between Weldon and the State Line after the expiration of the extension of the charter granted to that company by this State in one thousand eight hundred and ninety-one, unless and until the charter of said Petersburg Railroad

"shall be renewed by this General Assembly: *Pro-*
"*vided, further,* that nothing in this Act shall be con-
"strued as preventing the running of local passenger
"trains on Sunday.

"SEC. 2. That this Act shall be in force from
"and after its ratification."

An Act to establish the North Carolina Corporation Commission (ratified March 6th, 1899, P. L. 291):—

"SEC. 1. That there shall be elected by this General Assembly three Commissioners, who shall have gen-
"eral supervision of railroads, steamboat naviga-
"tion and canal companies, express and telegraph
"and telephone companies, building and loan asso-
"ciations, banks and sleeping car companies.

* * * * * * *

"They shall have such general control and super-
"vision of all railroad, steamboat, canal, express
"and sleeping car companies or corporations and
"of all other companies or corporations engaged in
"the carrying of freight or passengers; of all tele-
"graph and telephone companies, of all public and
"private banks; and all loan and trust companies
"or corporations and of all building and loan asso-
"ciations or companies necessary to carry into effect
"the provisions of the Act.

* * * * * * *

"SEC. 21. All common carriers subject to the pro-
"visions of this Act shall according to their powers
"afford all reasonable, proper and equal facilities for
"the interchange of traffic between their respective
"lines and for the forwarding and delivering of pas-
"sengers and freights to and from their several lines
"and those connecting therewith, and shall not dis-
"criminate in their rates and charges against such
"connecting lines, and connecting lines shall be re-
"quired to make as close connection as practicable
"for the convenience of the travelling public. And
"said common carriers shall obey all rules and regu-

"lations made by said commission relating to track-
"age. Any violation of the provisions of this section
"shall be punished by a fine of not less than five
"hundred dollars or exceeding five thousand dollars
"for each and every offense."

SPECIFICATIONS OF ERROR.

First—That the said Supreme Court of North Carolina erred in holding and adjudging that under section 21 chapter 164, of the Public Laws of 1899, the plaintiff had the right to require the defendant to run a passenger train between the town of Rocky Mount and the town of Selma, in said State, leaving Rocky Mount after 12.50 P. M. and arriving at Selma at or before 2.25 P. M. each day.

Second.—That the said court erred in holding and adjudging that under said section 21 of chapter 164, Public Laws of 1899, the said plaintiff had the right to require the defendant to run a passenger train leaving Rocky Mount after 12.50 P. M. and reaching Selma at or before 2.25 P. M., when, to obey said order, necessitated the operation by defendant between said stations of another train in addition to the four trains each way every day carrying passengers in operation by defendant between said stations.

Third.—That the said court erred in holding and adjudging that the plaintiff had the power to require of the defendant the putting on of an additional train for the sole purpose of conveniencing passengers who desired to travel on the Southern Railway from Selma westward, when it appeared that the defendant was already furnishing transportation between Rocky Mount and the Southern Railway by seven passenger trains each way daily, three of which seven passenger trains made close connection every day with west-bound trains of the Southern Railway at Goldsboro and Selma.

Fourth.—That the said court erred in holding and adjudging that the plaintiff had the power and right to require the defendant to operate an additional train for the convenience of passengers desiring to travel on the Southern Railway from Selma westward, when it appeared that the trains of the defendant had for about ten years been scheduled to reach Selma at 2.50 P. M., which was prior to the leaving time of the Southern Railway's west-bound train from Selma, and when it appeared that shortly before the making of the said order by the plaintiff the said Southern Railway Company had advanced the time for its said train to leave Selma from 3 o'clock P. M., to 2.35 o'clock P. M., and when it further appeared, and was so found as a fact by the North Carolina Corporation Commission, that the defendant could not so increase the schedule of its trains then running between Rocky Mount and Selma that they could reach Selma by the time the Southern Railway train would leave under its new schedule, and that such connection could only be afforded by the placing upon said road of additional service by defendant.

Fifth.—That the said court erred in holding and adjudging that the plaintiff had the right and power to require the defendant to operate an additional train between Rocky Mount and the Southern Railway every day at a net loss of fifteen dollars per day, for the sole convenience of passengers desiring to travel on the trains of the Southern Railway from Selma westward, when the defendant was already furnishing transportation for passengers between Rocky Mount and the junction points of the Southern Railway by seven trains each way daily, three of which made close connection with west-bound trains of the Southern Railway, and when defendant was maintaining with regard to the Southern Railway practically the same schedule which had been in force for ten years prior to the making of said order, the Southern Railway, shortly before the making of said order, having advanced the time for the departure of its train from Selma by thirty-five minutes. That in holding

and adjudging that the plaintiff had the power to make such order, and in adjudging and decreeing that the said order of the plaintiff should be enforced by the defendant from and after the tenth day of February, 1905, notwithstanding the loss incurred as aforesaid, the said court denied to the defendant and its property the equal protection of law and deprived it of its property without due process of law, contrary to the Constitution of the United States and the amendments thereto. That the effect of such judgment and decree of the said court, if carried into effect would be to abridge the defendant of its rights, privileges and immunities guaranteed to it as a citizen of the United States by the Constitution of the United States and the amendments thereto, and would deprive it of its property without compensation and without due process of law, and would deny to it the equal protection of the law.

Sixth.—That the said court erred in holding and adjudging that, notwithstanding there was no allegation that the defendant had failed to provide all necessary, proper and adequate service for the transportation of passengers over its own lines, the plaintiff had the right and power to require it to operate over a portion of its said lines, to wit, between Rocky Mount and Selma, an additional train, at a daily net loss of fifteen dollars, solely for the convenience and benefit of persons desiring to travel on trains of the Southern Railway westward from Selma. That such judgment and decree, putting in force the said order of the plaintiffs from and after the tenth day of February, 1905, deprived defendant of its property without due process of law, would deny to it the equal protection of the law, would abridge defendant's rights and immunities as a citizen of the United States, guaranteed to it by the Constitution and laws of the United States, and would be in violation of the Fourteenth Amendment to the Constitution of the United States.

Seventh.—That the said court erred in holding and adjudging that, notwithstanding it is a fact that no allega-

tion or complaint has been made that the defendant is failing to furnish ample and sufficient accommodation over its line between Rocky Mount and Selma by means of four trains carrying passengers each way every day, upon schedules adapted to the requirements of defendant's business and the convenience of its passengers, the plaintiff had the right and power to require it to operate a fifth train each way every day between said points for the sole convenience of passengers wishing to travel on trains of the Southern Railway from Selma westward. That such judgment and decree, putting in effect the plaintiff's said order from and after the tenth day of February, 1905, was a denial to defendant of the equal protection of the law and an abridgment of the rights and immunities guaranteed to it as a citizen of the United States by the Constitution and laws of the United States, and deprived defendant of its property without compensation and without due process of law, and in violation of the Constitution and laws of the United States .

Eighth.—That the said court erred in holding and adjudging that the order of the plaintiff requiring the defendant to operate an additional train when there was no allegation of insufficiency of service over its own line, and at a loss, and solely for the convenience of passengers desiring to travel over another railroad, was not in violation of the Constitution of the United States.

Ninth.—That the said court erred in holding and adjudging that, although defendant was giving adequate and necessary service over its own lines, it could be required to put on additional service and operate the same at a loss, solely for the convenience of passengers desiring to travel on another railroad, for and because of the fact that defendant's earnings from its operation was sufficient to enable it to run the said additional train at a loss and still pay operating expenses and some profit.

Tenth.—That the said court erred in holding and adjudging that the decision rendered by the judge of the

Superior Court of Wake County in this cause, and set out in the record, was erroneous, and in reversing the same, whereas the said court should have affirmed the said decision of the judge of the Superior Court of Wake County.

ARGUMENT.

Reduced to its simplest terms the question in the present case is:—

Can the State require a railroad company to run a special daily train at a loss for the convenience of a limited number of passengers who wish to make close connection with a particular train on a crossing road, it appearing that it is already running sufficient trains to accommodate the general travel on its lines and has arranged its schedules to best accommodate general travel and connect with all connecting roads, and that its failure to connect with such particular train was due to a change of schedule on the crossing road to which it was impracticable to conform by any change in the schedule of the train which had made the connection under the original schedule?

So far as they can be stated in general terms, the power of the State to regulate railroads and the constitutional limitations upon the exercise of such power are well established. In the case of

Wisconsin, &c., R. R. Co. *vs.* Jacobson, 179 U. S., 287,

this court, speaking by Mr. Justice Peckham, said:—

> "Railroads have from the very outset been re-
> "garded as public highways, and the right and the
> "duty of the Government to regulate in a reason-
> "able and proper manner the conduct and business
> "of railroad corporations have been founded upon

"that fact. Constituting public highways of a most "important character, the function of proper regula- "tion by the Government springs from the fact that "in relation to all highways the duty of regulation is "governmental in its nature. At the present day "there is no denial of these propositions."

* * * * * * *

"While this power of regulation exists it is also "to be remembered that the legislature cannot under "the guise of regulation interfere with the proper "conduct of the business of the railroad corpora- "tion in matters which do not fairly belong to the "domain of reasonable regulation. Lake Shore, &c., "Railway Company *vs.* Smith, 173 U. S., 684. The "only question arising as each case comes up for de- "cision is whether, in the particular case, the power "has been duly exercised."

In determining whether the power has been duly exercised in the present case, some previous decisions of this court as to what are unreasonable regulations may aid.

In the case of

Smyth *vs.* Ames, 169 U. S., 466-526,

it was said, Mr. Justice Harlan delivering the opinion:—

"A State enactment or regulations made under "the authority of a State enactment establishing "rates for the transportation of persons or property "by railroad that will not admit of the carrier earn- "ing such compensation as under all the circum- "stances is just to it and to the public, would deprive "such carrier of its property without due process of "law and deny to it the equal protection of the laws, "and would therefore be repugnant to the Fourteenth "Amendment of the Constitution of the United "States."

While it was held in the case of

St. Louis & San. Fran. R. W. *vs.* Gill, 156 U. S., 649,

that in a suit by a traveler to recover for charging him more than the legal mileage rate it was no defense to show that on the particular portion of the road traversed by the passenger the expense of transporting him was greater than the mileage rate, it was also held in the case of

Chicago, Mil. & St. P. R. W. *vs.* Tompkins, 176 U. S., 167,—

that it was error to base a judgment as to reasonableness of local rates upon the comparison of gross receipts and expenses of the entire business.

In

Cotting *vs.* Kansas City Stock Yards Co., 183 U. S., 79,

a case which did not involve the regulation of a railroad, but which did involve an attempted regulation of stock yards corporations, it was held that a statute which in effect applied to one corporation only and not to others in like business was unreasonable. This court, (Mr. Justice Brewer delivering the opinion), quoted with approval the words of Judge Catron, as follows:—

> "Every partial or private law which directly pro-
> "poses to destroy or affect individual rights or does
> "the same thing by affording remedies leading to
> "similar consequences, is unconstitutional and void."

In the case of

Lake Shore & Michigan Southern R. W. *vs.* Smith, 173 U. S., 684.

a statute of Michigan providing that one-thousand-mile tickets should be kept for sale at the principal ticket offices of railroads, upon certain terms and conditions was held an "illegal and unjustifiable interference with the rights of "the company." This court (Mr. Justice Peckham delivering the opinion) said:—

> "A railroad company, although a *quasi* public cor-
> "poration, and although it operates a public highway

"Cherokee Nation *vs.* Southern Kansas Railway, "135 U. S., 641; Lake Shore, &c., Railway *vs.* Ohio, "173 U. S., 285, 301), has nevertheless rights which "the legislature cannot take away without a viola- "tion of the Federal Constitution, as stated in Smyth "*vs.* Ames., 169 U. S., 466, 544. A corporation is a "person within the protection of the Fourteenth "Amendment. Minneapolis & St. Louis Railway *vs.* "Beckwith, 129 U. S., 26; Smyth *vs.* Ames, 169 U. S., "466, 522, 526. Although it is under governmental "control, that control must be exercised with due "regard to constitutional guarantees for the protec- "tion of its property.

* * * * * * *

"We cannot regard this exceptional legislation as "the exercise of a lesser right which is included in "the greater one to fix by statute maximum rates "for railroad companies. The latter is a power to "make a general rule applicable in all cases and "without discrimination in favor of or against any "individual. It is the power to declare a general law "upon the subject of rates beyond which the com- "pany cannot go, but within which it is at liberty to "conduct its work in such a manner as may seem to "it best suited for its prosperity and success. This "is a very different power from that exercised in the "passage of this statute. The Act is not a general "law upon the subject of rates, establishing maxi- "mum rates which the company can in no case vio- "late. The legislature having established such maxi- "mum as a general law, now assumes to interfere with "the management of the company while conducting "its affairs pursuant to and obeying the statute regu- "lating rates and charges, and notwithstanding such "rates it assumes to provide for a discrimination, an "exception in favor of those who may desire and are "able to purchase tickets at what might be called "wholesale rates—a discrimination which operates "in favor of the wholesale buyer, leaving the others "subject to the general rule. And it assumes to "regulate the time in which the tickets purchased "shall be valid and to lengthen it to double the period

"the railroad company has ever before provided. It "thus invades the general right of a company to con- "duct and manage its own affairs, and compels it to "give the use of its property for less than the gen- "eral rate to those who come within the provisions "of the statute, and to that extent it would seem that "the statute takes the property of the company with- "out due process of law. We speak of the general "right of the company to conduct and manage its "own affairs; but at the same time it is to be under- "stood that the company is subject to the unques- "tioned jurisdiction of the legislature in the exercise "of its power to provide for the safety, the health "and the convenience of the public, and to prevent "improper exactions or extortionate charges from "being made by the company.

"It is stated upon the part of the defendant in "error that the Act is a mere regulation of the pub- "lic business, which the legislature has a right to "regulate, and its apparent object is to promote "the convenience of persons having occasion to "travel on railroads and to reduce for them "the cost of transportation; that its benefit to "the public who are compelled to patronize rail- "roads is unquestioned; that it brings the reduction "of rates of two cents per mile within the reach of all "persons who may have occasion to make only infre- "quent trips; and that there is no reason why the "legislature may not fix the period of time within "which the holder of the ticket shall be compelled to "use it. The reduction of rates in favor of those pur- "chasing this kind of ticket is thus justified by the "reasons stated.

"The right to claim from the company transporta- "tion at reduced rates by purchasing a certain "amount of tickets is classed as a convenience. As "so defined it would be more convenient if the right "could be claimed without any compensation what- "ever. But such a right is not a convenience at all "within the meaning of the terms as used in relation "to the subject of furnishing conveniences to the "public. And also the convenience which the legis-

"lature is to protect is not the convenience of a small "portion only of the persons who may travel on the "road, while refusing such alleged convenience to all "others, nor is the right to obtain tickets for less "than the general and otherwise lawful rate to be "properly described as a convenience: If that were "true, the granting of the right to some portion of "the public to ride free on all trains and at all times "might be so described. What is covered by the "word 'convenience' it might be difficult to define "for all cases, but we think it does not cover this "case. An opportunity to purchase a thousand-mile "ticket for less than the standard rate we think is "improperly described as a convenience.

* * * * * * *

"Regulations for maximum rates for present trans- "portation of persons or property bear no resem- "blance to those which assume to provide for the "purchase of tickets in quantities at a lower than the "general rate, and to provide that they shall be good "for years to come. This is not fixing maximum "rates, nor is it proper regulation. It is an illegal "and unjustifiable interference with the rights of the "company.

* * * * * * *

"To say that the legislature has power to abso- "lutely repeal the charter of the company and thus "to terminate its legal existence does not answer the "objection that this particular exercise of legislative "power is neither necessary nor appropriate to carry "into execution any valid power of the State over "the conduct of the business of its creature. To "terminate the charter and thus end the legal life of "the company does not take away its property, but, "on the contrary, leaves it all to the shareholders of "the company after the payment of its debts."

With the aid of the principles and the illustrations furnished by these authorities the question of the validity of the order made in the present case will now be considered.

In the first place, it will be observed that the order complained of was not an exercise of the police power of the State. It was not made to protect the health, the morals, or the safety, of the citizens. It was the exercise of a governmental power to regulate, for public convenience, the facilities afforded to the public by a corporation. This distinction is important, because the interference of the State even with what Mr. Justice Brown in Minneapolis & St. L. R. R. *vs.* Minnesota, 186 U. S. 257, calls the "internal economy" of a railroad, may be justified where it is exercised for the public safety, just as a similar interference with the business of a private individual may be justified on the same grounds. An order which is reasonable, when necessary for the protection of the lives or health of the public, may be very unreasonable if made simply for public convenience.

In the second place, the order in the present case was a very unusual one.

None of the authorities cited by the court, or counsel in the court below, show any attempt by a State legislature, or a Commission, to increase the number of trains on a railroad. The nearest approach to one which the industry of counsel and court could find there, was the case of,

People *vs.* St. L. A. & T. H. R. R. Co., 176 Ill., 512,

cited in its opinion by the Supreme Court of North Carolina. (Record, page 269.) That, however, was not the case of an order to run an additional train. On the contrary, it was a petition for a *mandamus* to compel a railroad to perform a specific duty, to wit, to run a passenger train on its road. The railroad ran a freight train, to which was attached a passenger car. The case turned upon the question whether this could be properly termed a passenger train, and the court held that it could not; that the railroad was therefore not operating its road as a passenger road, and that a *mandamus* would lie to enforce this specific duty. In its opinion, the court quotes, without disapproval, the following passage from

a former decision (Ohio & Miss. R. W. *vs.* People, 120 Ill., 200):—

> "It is believed, however, no case can be found "which in the absence of statutory requirements "has gone to the length of holding that a railway "company may be compelled by *mandamus* to in- "crease the number of trains on its road or to run "daily a particular number of trains over its road, "and we are satisfied there is no common-law au- "thority for making such an order."

There may, it is true, be general regulations prescribing a minimum number of daily trains. An example of such legislation is found in

Lake Shore & Mich South. R. R., *v.* Ohio, 173 U. S., 285;

but it is believed that the cases show no attempted exercise by any State, or Commission, of a power to order a particular railroad to put on an additional train between certain points for the sake of affording additional convenience of transportation. Such a power would, it is submitted, partake more of the nature of an operation of such particular road than of a general regulation of all roads for the public convenience.

In the third place the order was not a uniform regulation of railroads, but was a direct interference with the business of a particular road.

It may be said that the North Carolina statute under which the Commission made its order, prescribed a general regulation that all connecting lines should be required to make as close connection as practicable for the convenience of the traveling public. Had the Supreme Court of North Carolina interpreted this to mean that every road in making up its schedules should, so far as practicable, having regard to its entire business in the State and all connections with other roads, arrange its schedules to make as close connections as practicable, it might, with some show of justice, be said, that this would have been a reasonable regulation of

all roads, and that if a road in making up its schedules, arbitrarily and wantonly disregarded such connections, it might be held liable. The Supreme Court of North Carolina, however, has so interpreted this statute that under it a road which has properly made up its schedules—schedules which it is not practicable to change with justice to all its patrons—may nevertheless be compelled to run an additional train at a loss to meet a change made by one of the connecting roads. This places it in the power of the Commission to compel any road to run extra trains to meet changes in the schedule of any crossing or connecting road, and so far from being an equal regulation binding on all, is a discrimination in favor of one road, at the expense of the other.

The practical effect of such power is shown in the present case. The Southern Railway Company changed its schedule and thus broke a schedule connection which had been maintained by the Atlantic Coast Line Railroad for ten years. Naturally, if an extra train was to be run to correct this, the Southern Railway should be required to run it. Yet the Commission compelled the Atlantic Coast Line Railroad, not the Southern Railway Company, to run the extra train.

The North Carolina statute, although in form a general regulation of railroads, has been so interpreted that the remedy under it may be the shifting upon one road of a burden caused by a change of schedule of the other. To refer to the quotation in Cotting *vs.* Kansas City Stock Yards Co., 183, U. S., 79, already cited, a law may be "partial if it destroys or affects individual rights or by "affording remedies leading to similar consequences."

In the fourth place, the order compelled the railroad to run an additional train at a pecuniary loss.

The effect of the order was practically the same as if the legislature or the Commission had said to the railroad, "You are supplying enough trains to meet the gen-"eral requirements of public traffic, and you have arranged "your schedules in the best manner practicable. For the

"convenience of passengers coming from certain points on "your branch lines, who wish to take a certain train on a con- "necting road, we will take possession of your road and run "an additional train to meet such connecting train and charge "you with the loss." What is this but the appropriation of property without compensation? There can be no just distinction between taking possession of and using a company's property at its expense and forcing the company to use the property for the benefit of the public at a loss to itself. On this point the language of this court through Mr. Justice Brewer in

Chicago, Mil., &c., R. W. *vs.* Tompkins, 176 U. S., 167-173, is applicable:—

> "It is within the competency of the legislature to "determine when and what property shall be taken "for public uses. That question is one of policy "over which the courts have no supervision; but if "after determining that certain property shall be "taken for public uses the legislature proceeds fur- "ther and declares that only a certain price shall be "paid for it, then the owner may challenge the "validity of that part of the Act, may contend that "his property is taken without due compensation, "and the legislative determination of value does not "preclude an investigation in the proper judicial "tribunals."

Conceding that it is within the power of the legislature to compel this particular railroad to run this particular additional train over its road, to meet some special public need, it is certainly not within the power of the legislature to compel the railroad to do it for nothing, much less to do it at a loss.

The answer of the Supreme Court of North Carolina to this suggestion was, that the Atlantic Coast Line Railroad Company made considerable money out of its general business in North Carolina and could easily afford to bear the loss, and reference was made to those cases in which it has been held that in fixing rates the

legislature is not confined to a comparison of the receipts and expenditures on a particular section of road or a particular article of freight. It is submitted, however, that there is no analogy between the cases. In the case of rates, the State is making a general regulation applying to the whole traffic and may justly take that whole traffic into consideration. In the present case, there is no general regulation of the traffic of the railroad. There is, on the contrary, an order to run a special train between two points to connect with another road for the convenience of a portion of the public. In such case the sole question is, Has the State the right to compel the railroad to do this at a loss? The fact that in the running of its other trains the company makes money, has no relevancy, unless it be held that the State can appropriate or use one portion of the company's property without compensation because the company makes money out of the remainder.

In the fifth place, the order was an interference with the management of the railroad for the benefit of only a comparatively small portion of the public who were given a special train for their convenience.

There is no allegation, or finding, that the Atlantic Coast Line Railroad has not given the best service practicable to the general public, both in the number of its trains and the arrangement of its schedules. There is no evidence, or finding, that it has not arranged its connections in the best manner possible when the convenience of all the public is considered. There is no evidence, or finding, that it does not run sufficient trains to the points of junction with the Southern Railway or fails to connect with other trains than train 135 at Selma. It is alleged, however (Record, page 78), that passengers from territory reached by certain branch lines of the Atlantic Coast Line Railroad, found it a great convenience to make connection in the afternoon at Selma with train 135 of the Southern Railway, and that when the Southern Railway changed its schedule and broke the

connection, these passengers, about twelve a day, (Record, page 262) were compelled to spend a longer time in their journey to points on the Southern Railway. This inconvenience could not be remedied by any change in the general schedule of the Atlantic Coast Line Railroad without inconveniencing the general public. Whether it could have been remedied by a change of schedule on the Southern Railroad does not appear to have been the subject of investigation. To remedy the inconvenience, the Commission practically ordered the Atlantic Coast Line Railroad to run a special train at a loss.

This, it is submitted, was an unwarrantable interference with the business of the railroad for the benefit of a few. Nor is it any answer to this, to say that all the public who happened to be at points on the branch lines would receive the benefit of the special train, or that the special train was a matter of convenience to such of the public as might wish to use it. Public convenience, as used in the cases justifying regulation of corporations, does not mean any accommodation which the legislature may think desirable. This was pointed out in the case of

Lake Shore, &c., R. W. *vs.* Smith, 173 U. S., 684,

already quoted. Within reasonable limits the State, it is submitted, may make general regulations for the benefit of all the public, but it cannot say to a railroad: "Your schedule is the best you can make; you are man-"aging the road in the best way possible, having regard "to the respective rights of travelers from all sections of "your road; you are making all connections as closely "as practicable; you cannot change your schedules with-"out inconveniencing the public generally; but, we think "the convenience of persons living on certain branch "roads will be served by enabling them to catch a certain "afternoon train on a connecting road, and as that road "has changed its schedule so as to break this connection "you must run a special train at a loss to enable them to "make that connection." If the plea of public convenience can be used in such a case it could be used to justify almost any interference with the business of a

railroad. Special train after special train might be ordered to be run, because of a like convenience to other special travelers until the whole revenue would be exhausted. To accommodate one set by such an order and to deny accommodation to another having an equally meritorious claim would be an unjust discrimination.

After orders to run special trains at a loss, with an attendant exhaustion of half the railroad revenue, could there be a denial of a right to others to have as many additional trains run as the according to them of like conveniences would require? Where does the right to exact running at a loss cease, if it exists? It is submitted that the interference in this case is, to use the language of this court in the case last quoted, "an illegal and unjus-"tifiable interference with the rights of the company."

Finally, it is submitted that even if the legislature had the power to direct the running of a special additional train at a loss in order that a comparatively few passengers from a branch line might make convenient connection with a particular train over another road, the order itself was under the circumstances so unreasonable that it must be considered an unwarrantable interference with the property rights of the Atlantic Coast Line Railroad.

The Atlantic Coast Line Railroad was running four trains daily to Selma and three to Goldsboro, the two connecting points with the Southern Railway. When the Southern Railway broke the connection of train 135 at Selma it also broke the morning connection of a train at Goldsboro. The Atlantic Coast Line Railroad in spite of the fact that it was not responsible for this change, altered its schedules so as to meet the morning train at Goldsboro (Record, page 98), but found it impracticable to alter its schedules for its afternoon train. There is no finding that the Atlantic Coast Line Railroad has failed to do anything in its power to meet the reasonable demands of the public, except that it will not run a special train, at a loss, to accommodate the comparatively

few passengers on its branch lines, who wish to make close connection with a particular train on the connecting road. Its schedules were not new schedules, but had been maintained for ten years. The inconvenience of the branch line passengers was caused, not by these schedules, which it was not practicable to alter, but by the change of schedule of the connecting road. Upon these facts, the Atlantic Coast Line, (not the Southern Railway Company), was ordered to run a special train at a loss to suit the convenience of these branch line passengers who wished to connect with, and, travel over, the Southern Railway. Could there be a more unreasonable and unjustifiable interference with its affairs? It is no answer to this to say that the jury found it was "reason-"able, and proper that for the convenience of the traveling "public" the connection should be made. The other facts found by the jury, coupled with the omission of either finding or testimony justifying the order, make the question one for the court. The finding resulted from a failure properly to instruct the jury as to the duty and rights of the appellant. It is for the court to say what is the nature of the convenience which justifies such an order and how far, for such convenience, the legislature or Commission can interfere with the reasonable exercise by the railroad of its right to operate its own road.

There are two matters referred to in the opinion of the Supreme Court of North Carolina which may be briefly discussed. The court (Record, page 264) seems to be of opinion that the fact that the trains of the Atlantic Coast Line Railroad often failed to make the schedule time to Selma and thus often missed connection, has some weight. The order, however, did not pretend to deal with delay in meeting the existing schedule, nor did the Commission ultimately attempt to interfere with the schedule. On the contrary, it found that no change of schedule was practicable. It attempted to remedy, no defects in the original schedule of both roads, but to meet a condition caused by a change made by the Southern Railway in its

schedule. No previous default of the Atlantic Coast Line Railroad, if such existed, could justify an order on it to run a special train to remedy the inconvenience caused by the Southern Railway's change of schedule.

The Supreme Court of North Carolina also seems to have been of opinion (Record, pages 261-265) that the Commission impartially dealt with both roads because it originally ordered the Atlantic Coast Railroad Company to advance its schedule time twenty-five minutes and ordered the Southern Railway Company upon notice to wait fifteen minutes at Selma. In the one case, however, the road which had not caused the trouble was ordered to change its entire schedule while the other road was allowed to keep its new schedule and merely to hold its trains fifteen minutes on notice, in case of some delay. In the end, as the change of schedule was found by the Commission to be impracticable, the Atlantic Coast Line Railroad Company was ordered to run an additional train at a loss, so that the question of schedules became unimportant.

For the reasons given it is submitted that the judgment should be reversed.

JOHN G. JOHNSON,
WARREN G. ELLIOTT,
FRANK P. PRICHARD,
Attorneys for Plaintiff in Error.